Supreme Court U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Wayne A. Stanton, individually and in his capacity as Administrator of the Indiana State Department

of Public Welfare; Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr., James W. Burnett, Jr., individually and in their capacity as members of the State Board of Public Welfare, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), entered in cause number 75-1459 on January 7, 1976, which affirmed the judgment of the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court).

OPINION BELOW

The opinion of the Seventh Circuit issued on January 7, 1976, has not been officially reported. A copy of said opinion has been appended hereto at page A-1. The January 13, 1975, Order of the District Court has not been officially reported, but a copy of said Order is appended hereto at page A-8.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important federal-state question in a way in conflict with the United States Courts of Appeals for the Third Circuit, the Fifth Circuit, and the Sixth Circuit.

The decision of the Seventh Circuit was entered on January 7, 1976. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTION PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATEMENT OF THE CASE

This Petition arises from an affirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Bond v. Stanton*, Cause No. 73 H 184, whereby the District Court ordered the Petitioners herein to pay $2,366.00 in attorney fees for Respondents' (Plaintiffs' below) counsel.

Facts Material to the Consideration of the Questions Presented

The original lawsuit was commenced on July 23, 1973 when Plaintiffs filed a complaint in the District Court alleging that Indiana's Early and Periodic Screening, Diagnoses and Treatment (hereafter EPSDT) program was unacceptable under the statutes and regulations of the Congress of the United States, and seeking an injunc-

tion mandating the State to institute an acceptable EPSDT program.

The action by Plaintiffs was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. § 1331, and was decided on cross motions for Summary Judgment in favor of Plaintiffs. 372 F. Supp. 872 (N.D. Ind., 1974). The District Court held that the State of Indiana through its Welfare Department had not complied with the provision of the Social Security Act, 42 U.S.C. § 1396d (a) (4) (B) as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continuing to administer EPSDT in violation of 42 U.S.C. § 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10(a) (3)," and further, "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

The decision of the District Court was affirmed by the Seventh Circuit on October 30, 1974, 504 F. 2d 1246. Certiorari was denied on March 17, 1975, 95 S. Ct. 1415 (1975). In the meantime, the District Court, on January 13, 1975, entered its Order granting attorneys' fees to Plaintiffs' attorneys in the amount of $2,366.00, finding that there was a lack of good faith on the part of the Defendants in implementing the EPSDT program, and holding that the Eleventh Amendment did not bar an award of attorneys' fees against state officials. The Seventh Circuit affirmed that Order on January 7, 1976.

In an order dated June 3, 1975, issued upon a request for attorneys' fees by Plaintiffs following the appeal by the Petitioners herein of the case on the merits, the Seventh

Circuit stated that the case was ". . . not an appropriate case for utilization of the 'common benefit' or 'common fund' theory," and further held that there was no evidence that the Defendants were in bad faith in prosecuting an appeal. See Appendix page 11.

On February 19, 1976 the Seventh Circuit denied Plaintiffs' request for attorneys' fees following the appeal by Petitioners of the award of attorneys' fees by the District Court. See Appendix page 12.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities.

The issue of the Eleventh Amendment bar to an award of attorney fees against state officials has been decided differently by various Circuit Courts of the United States Court of Appeals. In this case the Seventh Circuit held that the Eleventh Amendment is not a bar, and stated that it considered itself "... bound by the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972)." However, the decision of the Seventh Circuit to follow the summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala., 1972), is contrary to decisions of the Third, Fifth and Sixth Circuits, including the case of *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir., 1974) cert. denied 95 S. Ct. 1996 (1975) wherein the Sixth Circuit stated at pages 709 and 710:

> "Careful study of the *Edelman* opinion leads us to conclude, as did the Third Circuit, that the Eleventh

> Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states . . . The Amendment bars any award which is 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the Defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358."

See note No. 44 in *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.,* 95 S. Ct. 1612, 1627 (1975), for a listing of the cases decided by the lower courts.

The Respondents would submit that attorney fees are not chargeable against them due to the applicability of the Eleventh Amendment to the Constitution of the United States. The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State."

Any recovery of attorneys fees by the plaintiffs would not come from the named defendants, who are merely nominal parties, but would come from the State Treasury. In fact, the Order of the District Court specifically stated as follows:

> "Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees . . ." Appendix, p. 10.

As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945) at page 464:

> ". . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants" (cases omitted).

This statement was cited with approval in the case of *Edelman v. Jordan,* 94 S. Ct. 1347, 1356 (1974) where this Court stated:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citing cases)"

In its Opinion the Seventh Circuit cites three cases for the proposition that a federal court has inherent power to assess attorneys' fees against a losing party who has acted in bad faith. *Alyeska Pipeline Service Co. v. Wilderness Society, supra; F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116 (1974); *Hall v. Cole,* 412 U.S. 1 (1973). None of those three cases involved an award of attorney fees against a state official, and therefore, are not controlling herein.

The issue of whether the Eleventh Amendment bars an award of attorney fees against a state is presently pending before this Court in the case of *Bitzer v. Matthews,* No. 75-283. Unlike *Bitzer,* however, this case involves a finding of a "lack of good faith" against the state officials. While respondents do not concede bad faith in this cause, they would submit that that finding is irrelevant to the issue presented herein, and would urge this Court to hold that the Eleventh Amendment is an absolute bar to any money recovery from a state treasury.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 75-1459

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association; SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

vs.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare; JOHN KELLEY, individually and in his capacity as Director of the Lake County Department of Public Welfare,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division
No. CV 73 H 184
ALLEN SHARP, *Judge.*

Argued October 31, 1975—Decided January 7, 1976

Before STEVENS, *Circuit Justice,** TONE, *Circuit Judge,* and HOFFMAN, *Senior District Judge.***

TONE, *Circuit Judge.* This appeal presents the question of whether the eleventh amendment bars the assessment of attorneys' fees against state officials sued in their official capacity under 42 U.S.C. § 1983. We hold that it does not, because we consider ourselves bound by the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972).

Plaintiffs brought this class action to compel the defendant Indiana officials to comply with an amendment to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396g, which was added in 1967. That amendment, 42 U.S.C. § 1396d(a) (4) (B), required the states to adopt an early and periodic screening, diagnosis, and treatment (EPSDT) program for all Medicaid-eligible children, covering those under six years of age by February 7, 1972, and those under twenty one by July 1, 1973. When the defendant officials failed to meet either deadline, plaintiffs brought this action. The District Court found that defendants had failed to comply with the amendment and ordered them to do so by July 1, 1974, reserving the question of attorneys' fees. 372 F.Supp. 872 (N.D. Ind. 1974). This court affirmed. 504 F.2d 1246 (7th Cir. 1974). Later, in an unpublished order, the District Court assessed attorneys' fees against defendants in their official capacities in the amount of $2,366. The award was based on

* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

the private attorney general theory, now defunct by reason of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), and on the defendants' bad faith both in failing to comply with the requirements of federal law before the action was commenced and in the course of the litigation. This is an appeal from that order.

A federal court has inherent power to assess attorneys' fees against a losing party who has acted in bad faith. See *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 421 U.S. at 259; *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974). The bad faith which is the basis for the award may be in the conduct which necessitated the action or in conduct occurring during the course of the action. *Hall v. Cole,* 412 U.S. 1, 15 (1973).

The District Court's finding of bad faith in this case is amply supported by the evidence. The defendant state officials, disregarding their clear legal duty, were, in the words of the District Court, "more than two years late in even attempting to implement a statewide EPSDT program." It was this conduct which necessitated the present injunctive suit. *Cf. Doe v. Poelker,* 515 F.2d 541, 548 (8th Cir. 1975); *Fairley v. Patterson,* 493 F.2d 598, 606 (5th Cir. 1974). In addition, defendants, after suit was filed, "continually asserted compliance with HEW requirements in the face of documentation to the contrary." Stringent as the standards for establishing bad faith may be, *Satoskar v. Indiana Real Estate Commission,* 517 F.2d 696, 698 (7th Cir. 1975), they were more than satisfied by the facts before us. The award of attorneys' fees was therefore justified unless barred by the Constitution.

As noted by the Supreme Court in *Alyeska, supra,* 421 U.S. at 269 n. 44, and by us in *Satoskar, supra,* 517 F.

2d at 698 n.,[1] the circuits are divided on the question of whether the eleventh amendment prohibits assessment of attorneys' fees against a state or state officers acting in their official capacity. Courts have also differed about whether lower federal courts faced with that question are bound by the Supreme Court's summary affirmance of *Sims v. Amos, supra.*[2] In that case a three-judge court,

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[1] In addition to the cases cited in the footnote in *Alyeska* and *Satoskar* referred to in the text, see *Gates v. Collier*, —— F.2d ——, No. 73-1790 (5th Cir. 1975) and *Newman v. Alabama*, —— F.2d ——, No. 73-2033 (5th Cir. 1975) (both cases remanding issue of attorneys' fees to the district court for reconsideration; *Mathews v. Bitzer*, —— F.2d ——, No. 75-2581 (2d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3354 (Dec. 15, 1975); *cf. Hoitt v. Vitek*, 361 F. Supp. 1238, 1255 (D. N.H. 1973), *aff'd*, 495 F.2d 219 (1st Cir. 1974). For a comprehensive discussion of attorneys' fees and the eleventh amendment see Note, 88 *Harv. L. Rev.* 1875 (1975).

[2] The Ninth Circuit relied on *Sims* in awarding attorneys' fees in *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974). A majority of the Fifth Circuit, sitting in banc, evidently did not view *Sims* as controlling in *Newman v. Alabama, supra*, ——F.2d ——, when they remanded for reconsideration in light of *Alyeska* and *Edelman v. Jordan*, 415 U.S. 651 (1974), but five members of that court, speaking through Judge Gewin, felt bound by *Sims*. See also the companion case of *Gates v. Collier, supra*, —— F.2d ——, in which Judge Tuttle, writing for himself and the five dissenters in *Newman*, endorsed Judge Gewin's *Newman* dissent. In the Sixth Circuit, two panels have not followed *Sims*. *Jordan v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), vacated for further consideration in light of *Alyeska* (presumably as to the part of the opinion upholding an award against a defendant individually on a private attorney general theory), 421 U.S. 982 (1975). In an intervening decision, *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974), another panel permitted an award of attorneys' fees in an opinion which denies retroactive welfare benefits on the ground of *Edelman's* interpretation of the eleventh amendment, but, in discussing attorneys' fees, makes no reference to *Edelman* or the amendment although citing *Sims*. *Milburn* was cited in *Taylor* only for another point. 503 F.2d at 904.

after finding malapportionment in the Alabama legislature, 336 F.Supp. 924, awarded attorneys' fees and costs to the plaintiffs, 340 F.Supp. 691. It is not clear from the second opinion of the three-judge court in *Sims*, 340 F.Supp. 691, which dealt with attorneys' fees and costs, whether the defendant state officials asserted their constitutional immunity, although the court did say in a footnote that the state had no power to impart any immunity to its officers "from [an] injunction or from its consequences, including court costs incident thereto." 340 F. Supp. at 694 n. 8. The Supreme Court, however, will consider a claim of immunity under the eleventh amendment even though it was not raised in the trial court. *Edelman v. Jordan, supra*, 415 U.S. at 677-678. And, in their jurisdictional statement filed in the Supreme Court, the *Sims* defendants specifically raised the attorneys' fees issue, 41 U.S.L.W. 3090, and asserted that the award of attorneys' fees against "elected state officials sued in their official capacity . . . was tantamount to the award of a monetary judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity." See *Newman v. Alabama, supra*, ——F.2d at —— (Judge Gewin dissenting). A state's sovereign immunity was historically, see *Hans v. Louisiana*, 134 U.S. 1 (1890), the basis for the line of cases culminating in the present doctrine that the

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Footnote 2 Continued

Judge Edwards dissented in *Taylor*, arguing, *inter alia*, that *Sims* was binding. 503 F.2d 906, 907-908. Finally, the Third Circuit, in *Skehan v. Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974), vacated in light of *Alyeska* and *Wood v. Strickland*, 421 U.S. 983 (1975), held that *Edelman* "appears to bar the award of attorneys fees from the state treasury," and in a footnote attributes the Supreme Court's failure to overrule its summary affirmance of *Sims* to inadvertence. See also *Sincock v. Obara*, 320 F.Supp. 1098 (D. Del. 1970) (three-judge court).

eleventh amendment governs suits against a state by its own citizens, even though the literal words of the amendment refer only to suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State." See *Edelman v. Jordan, supra,* 415 U.S. at 663. Compare Mr. Justice Brennan's dissenting remarks in *Yeomans v. Kentucky,* —— U.S. ——, ——, 44 U.S.L.W. 3303, 3304 (1975). Accordingly, it would appear that the *Sims* jurisdictional statement sufficiently raised the question of whether the eleventh amendment barred the attorneys' fees award. There can be no doubt, moreover, that the Court intended to rule on the award of attorneys' fees. The initial publication of its order in the unbound volume of official reports referred only to 336 F.Supp. 924, the decision on the merits, as affirmed. As finally published, however, the order of affirmance included 340 F.Supp. 691, the decision which awarded attorneys' fees and costs. 409 U.S. 942. We believe that the Supreme Court's summary affirmance of the district court's award of attorneys' fees against state officials in their official capacity was a decision on the merits of the immunity issue presented to us in this case.

In *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975), the Supreme Court set at rest any doubts about whether its summary disposition of a case on the merits is binding on the lower federal courts:

> "[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'"

We do not find in *Edelman v. Jordan* evidence of an intention to overrule *Sims* or of a doctrinal development indicating that *Sims* would be decided differently today. *Cf. Hicks*

v. Miranda, supra, 422 U.S. at 344.[3] Mr. Justice Rehnquist observed in *Edelman* that the difference between prohibited and permitted relief "will not in many instances be that between night and day," 415 U.S. at 667. The prescience of that observation is illustrated by the conflicting views of the circuits and of judges within the circuits on the question before us. Finally, the citation of *Sims* without comment in the footnote in *Alyeska* which collects the conflicting cases on the application of the eleventh amendment to attorneys' fees, 421 U.S. at 269, n. 44, does not, in our view, show an intention to repudiate the *Sims* holding. A signal to the lower courts would take, we think, a clearer form than that.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

[3] Compare the discussion in the Sixth Circuit's *Jordan v. Gilligan, supra,* 500 F.2d at 707-708, with *Doe v. Hodgson,* 500 F.2d 1206, 1207-1208 (2d Cir. 1974), and Judge Edwards dissent in *Taylor v. Perini, supra,* 503 F.2d at 907.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

LOUISE BOND et al	)	
Plaintiffs	)	
v.	)	No. 73 H 184
	)	
WAYNE STANTON et al	)	
Defendants	)	

ORDER

This Court, in its order of March 22, 1974, *Bond v. Stanton,* 372 F.Supp. 872, 875 (ND Ind. 1974), reserved ruling on the plaintiffs' request for attorney fees "pending the filing of supplemental briefs directed to this issue and an accounting of actual costs." Having considered the extensive briefs of both parties, the Court now finds as follows:

1. That this Court has the equitable power to award attorney fees in cases brought pursuant to 42 U.S.C. § 1983 and that this is a proper case in which to make such an award.

2. Plaintiffs meet the requirements of the "private attorney general" theory for awarding attorney fees in that (a) the rights enforced, i.e. right to the benefit of an effective EPSDT program, flows from a program that was considered to be of great importance and priority by Congress, and (b) the suit furthers the interests of a substantial class of persons in Indiana.

3. Although not necessary for an award of attorney fees, an additional reason for awarding attorney fees in this case is the demonstrated lack of good faith on the

part of the defendants who were more than two years late in even attempting to implement a statewide EPSDT program and continually asserted compliance with HEW requirements in the fact of documentation to the contrary. Evidence to support this finding was also adduced in the hearing held on November 5, 1973 on cross-motions for summary judgment.

4. The Eleventh Amendment to the United States Constitution does not bar an award of attorney fees against the state defendants because such fees fall within the permissible "ancillary effect on the state treasury" as outlined in *Edelman v. Jordan,* 94 S. Ct. 1347, 1358 (1974). County defendants are not protected by the Eleventh Amendment, Id. at 1358 n. 12. See also *Class v. Norton,* 505 F. 2d 123 (2d Cir. 1974).

5. Both the Valparaiso University School of Law Legal Aid Clinic and Project Justice and Equality are proper recipients of an award of attorney fees because neither can in any way be considered a part of federal, state or local government, they generally represent individuals and organizations who would otherwise receive no legal representation, they must expend considerable sums to meet the expenses of litigation and the decision to award fees should not stand on the status of the party awarded fees.

6. In determining the amount of fees to be awarded this Court must consider the following factors:

(a) The attorneys and law students representing the plaintiffs are experienced in this type of litigation and demonstrated a high degree of competency in pursuing this matter on behalf of the plaintiffs and members of the class;

(b) The case was relatively complex and novel in that only one other case involving EPSDT had been decided prior to the filing of this case;

(c) As pointed out by the Seventh Circuit in affirming the decision of this Court, the EPSDT program is of vital importance to the health needs of the low income plaintiffs and members of the class and it has been given priority by the Congress of the United States;

(d) The number of hours spent by the attorneys (118.3 hours) and law students (365 hours) on this case.

Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees. This amount represents compensation at the rate of $20.00 per hour 112.4 attorney hours and $30.00 per hour for the 6 attorney hours in court. It shall be paid directly to the attorneys for the two organizations involved and it will be their responsibility to divide the funds between the organizations. Plaintiffs are also awarded costs pursuant to *Boston Chapter, NAACP, Inc. v. Beecher,* —— F. 2d ——, (1st Cir. 1974), 43 U.S.L.W. 2228, dec. November 8, 1974.

Enter January 13, 1975.

/s/ Allen Sharp

Judge, United States District Court

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 3, 1975.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

WAYNE STANTON, et al., Defendants-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 73 H 184 Allen Sharp, *Judge.*
No. 74-1409 vs.	)	
LOUISE BOND, et al., Plaintiffs-Appellees.	)	

ORDER

Pursuant to Rule 39 of the Federal Rules of Appellate Procedure, and after having prevailed on appeal, plaintiffs-appellees have applied to this court for costs and attorneys' fees on appeal.

Alyeska Pipeline Service Co. v. *The Wilderness Society,* 43 U.S.L.W. 4561 (U.S. May 12, 1975), forecloses an award of attorneys' fees on a private attorney general rationale in the absence of statutory authorization as in this case. Additionally, this is not an appropriate case for utilization of the "common benefit" or "common fund" theory. *Townsend* v. *Edelman,* slip op. Nos. 73-1960, 1961 at 11 (7th Cir., June 2, 1975); *Satoskar* v. *Real Estate Commission,* slip op. No. 74-1946 (7th Cir., June 2, 1975). Finally, our

examination of the record on appeal convinces us that the defendants-appellants were not in bad faith in prosecuting this appeal.

The plaintiffs-appellees' request for attorneys' fees on appeal is denied and the Clerk is ordered to award costs to the plaintiffs in the amount of $67.90.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 19, 1976.

Before

Hon. PHILLIP W. TONE, Circuit Judge

LOUISE BOND, ET AL., Plaintiffs-Appellees,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. (CV 73 H 184)
No. 75-1459 vs.	)	
WAYNE A. STANTON, ET AL., Defendants-Appellants.	)	

This matter comes before the court on the "Application For Costs And Attorney Fees" filed herein on January 21, 1976 by counsel for the plaintiffs-appellees, and the "Motion To Deny Payment Of Attorney Fees" filed herein on February 9, 1976 by counsel for the defendant-appellant. On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that the aforesaid appplication of the plaintiffs-appellees is hereby DENIED.